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REMARKS

Claims 1, 21, 26 and 31 have been amended. No claims have been cancelled, and no new claims have been added. Claims 1-35 are pending.

Disclaimers Relating to Claim Interpretation and Prosecution History Estoppel

Claims 1, 21, 26 and 31 have been amended. Except as specifically admitted below, no claim elements have been narrowed. Rather, cosmetic amendments have been made to the claims to broaden them.

The claims of this application are intended to stand on their own and are not to be read in light of the prosecution history of any related or unrelated patent or patent application. Furthermore, no arguments in any prosecution history relate to any claim in this application, except for arguments specifically directed to the claim.

Claim Objections

The Examiner objected to claims 1, 6, 11, 16, 21, 26 and 31. The Examiner pointed to the following informalities: "each step or element is not separated by a punctuation mark (for example, a comma or a semi-colon)". This objection is respectfully traversed. The Examiner's concern appears to be that the claims sparingly use punctuation such as colons, commas and semicolons. There is no basis in the law, rules or MPEP for making such an objection. Indeed, the objection cites to no law, rule or MPEP section in making the objection. The pertinent provisions encourage the use of indentations to segregate subcombinations or related steps. See 37 CFR 1.75 and MPEP § 608.01(i)-(p). This practice has been scrupulously followed in the claims. Aside from requiring a final period, there is no mention the CFR and MPEP of internal punctuation. Given that the rules specifically encourage indentations, the rules' silence on commas, semicolons and colons implies that they are entirely optional. The Examiner has provided no citation which supports the objection. Nor has the Examiner stated that the claims are in any way unclear due to the sparsity of

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punctuation. Indeed, the claims are quite clear. Withdrawal of the objection is therefore respectfully requested.

The Examiner objected to claims 1, 21, 26 and 31 for reciting "the activities of a large number of users" with having an antecedent basis. These claims have been amended, rendering this objection moot.

Claim Rejections - 35 USC § 103

The Examiner rejected claims 1-2, 5-12, 15-23, 26-28 and 31-33 under 35 USC § 103 as obvious from Smith et al. (US Patent No. 6,091,802) in view of Averbuj (US Patent Publication No. 20050257109). This rejection is respectfully traversed.

A. The References May Not Properly Be Combined

As set forth in their titles and abstracts, Smith is directed to a Telecommunication System Tester with Integrated Voice and Data that "includes a test computer for scheduling and controlling the execution of test scripts ... to simulate transactions that typically take place on the telecommunications system", and Averbuj is directed to a Built-In Self Test (BIST) Architecture that "stores a set of commands that generically define an algorithm for testing memory modules" in a device. The references are so unrelated that it would not be logical to combine different aspects to result in the claimed subject matter. Succinctly, Smith discloses a telecommunications testing system and Averbuj discloses a memory testing system. These publications disclose different techniques that solve problems that are wholly unrelated to one another and problems that are in different technology areas. As such, their teachings may not be properly combined.

Moreover, please review the U.S. classifications of Smith and Averbuj. Smith is in class 379/29 and various other subclasses in class 379. Class 379 is for "telephonic communications" while subclass 29.01 is more specifically directed to "terminal arrangement to enable remote testing (e.g., testing interface)". Differently, Averbuj was published in class 714/33 which is directed to

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"error detection/correction and fault detection/recovery" "derived from analysis (e.g., of a specification or by stimulation)". Now in prosecution, Averbuj has been placed in class 714/718. Class 714/718 is specifically directed to "memory testing". The U.S.P.T.O.'s own classification system shows that Smith and Averbuj may not be properly combined as they are in wholly different patent classes.

Further, it is not apparent why a person involved with a telecommunications testing system of Smith would avail himself of the memory testing system of Averbuj. "[T]he Examiner has not provided a sufficient reason of explicit analysis of why the disclosures of the references should be combined." *Ex parte Erkey at al.*, Appeal 20071375 (BPAI May 11, 2007).

In discussing claim 1, the Examiner asserts that the first three steps of the method are disclosed in Smith, while the last two steps are asserted to be disclosed in Averbuj. However, there is no teaching or suggestion in Averbuj of telecommunications, and there is no teaching or suggestion in Averbuj of network protocols as disclosed and claimed in Smith. ("The specified network protocol may typically be a loop-start protocol, a wink-start protocol, or a MFC-R2". Smith 5:54-56) As such, there is no tie between the memory testing system of Averbuj and the telecommunications testing system of Smith.

In addition, Smith already discloses that it uses test scripts that include commands involving telephony functions. (See Smith, 5:56-61) There is no problem in Smith's use of test scripts; the scripts achieve their intended purpose. In the *KSR* case, the Supreme Court qualified the issue of hindsight by stating that "[r]igid preventative rules that deny factfinders recourse to common sense, however, are neither necessary under our case law nor consistent with it." *KSR Int'l Co. v. Teleflex, Inc.*, 127 S.Ct. 1727 (2007). In the instant case, a person of ordinary skill in the art *having common sense* at the time of the invention would not have reasonably looked to the Averbuj to solve a problem with scripts or test algorithms problem, because Smith did not have any problem to be solved. See *Ex parte Rinkevich et al.*, Appeal 20061317 (BPAI May 29, 2007). It can only be from

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improper hindsight that the Examiner is attempting to combine Smith and Averbuj. Since Smith already teaches a solution, it is clear that the Examiner has used the claims as a guide or roadmap in formulating the rejection. Accordingly, the rejection is not well founded and should be withdrawn.

B. The References Do Not Disclose All of the Claimed Limitations

As to the substance of claim 1, claim 1 recites a "protocol engine". The Office Action directs us to Averbuj for a teaching of protocol engines. However, the sequencers and test algorithms of Averbuj fail to teach or suggest the protocol engine claimed. Claim 1 is directed to "a method of creating network traffic". The term "protocol engine" must be interpreted in view of the "method of creating network traffic" and the specification as a whole. The specification defines "network traffic" as "data units communicated over a network" which support one or more higher level or lower level communications protocols such as UDP, TCP, FTP, ISDN, PPP, FDDI and others. (Specification as published, paras. 0016 and 0026) As such, Averbuj fails to teach or suggest "invoking a protocol engine for each of the commands in the test script such that each protocol engine has an associated command" and "each protocol engine executing its associated command" as claimed. This is particularly so because Averbuj fails to teach or suggest a "protocol engine" as claimed.

In addition, the Examiner further asserts that the sequencers (element 8) of Averbuj teach claimed "protocol engine". This cannot be so. Averbuj explicitly states that

> Sequencers 8 interpret and execute test algorithms provided by BIST controller 4. In particular, sequencers 8 receive high-level commands from BIST controller 4 that define a complete BIST algorithm.

Averbuj, para. 0030, first 4 lines. All this portion of Averbuj teaches is that a sequence of commands may be included in a test algorithm. As such, there is no teaching or suggestion in Averbuj of communications, and there is no teaching or suggestion in Averbuj of communications protocols like the protocols claimed.

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Thus, the cited references fail to show a "protocol engine" as claimed. Because this limitation is not found in the cited art, claim 1 is patentable over the cited references. Claim 1 is patentable over the combination of Smith and Averbuj because the combination of cited references do not teach or suggest all of the limitations recited in claim 1.

Claim 1 also recites an "application thread". An application thread is not a traditional operating system thread as it is lighter weight such that it requires "a smaller amount of network testing system resources to execute". (Specification as published, para. 0036) The Office Action directs us to col. 4, lines 61-65 of Smith for the teaching of an application thread. However, there is nothing in Smith that discloses application threads. Smith only discusses "threads of control" that may not exceed the number of available processors. (Smith, 4:61-65) The "threads of control" of Smith do not teach or suggest the claimed application threads. Averbuj fails to disclose an application thread. Because the combination of references fails to disclose an application thread, claim 1 is patentable over the cited references.

The rejection of claim 1 and all claims depending thereon should be withdrawn.

To the extent independent claims 11, 21, 26 and 31 each recite a protocol engine and application threads, the above discussion concerning Averbuj and claim 1 applies. Because the combination of Smith and Averbuj fails to teach or suggest the claimed protocol engines and the claimed application threads, claims 11, 21, 26 and 31 are patentable over the cited references. By virtue of their dependence on claims 11, 21, 26 and 31, all claims dependent on claims 11, 21, 26 and 31 are patentable over the cited references.

In addition, as to claims 21, 26 and 31, these claims recite "user space" and "operating system space". However, the cited references fail to make a distinction between or disclose "user space" and "operating system space". Specifically, claim 21 recites "a plurality of script interpreter units in user space", "an application thread in user space" and "a plurality of protocol engines in user space". The Office Action states that Smith's user test computer 202 discloses "user space". This is not so.

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A user computer includes both "user space" and "operating system space". Importantly, Smith does not disclose the claimed "user space" as to the claimed elements. Further, Averbuj similarly fails to disclose that the sequencers (which are asserted to disclose the claimed protocol engines) are in user space. Averbuj is silent as to whether the sequencers are in user space or operating system space. As such, because Smith and Averbuj fail to disclose the claimed elements in "user space", claim 21 is patentable over the cited references.

As to claim 26, claim 26 recites "a plurality of script interpreter units in user space", "an application thread in user space" and "a plurality of protocol engines in operating system space". The Office Action states that Smith's user test computer 202 discloses "user space". This is not so. A user computer includes both "user space" and "operating system space". Importantly, Smith does not disclose the claimed "user space" as to the claimed elements. In addition, the Office Action appears to assert that because Averbuj discloses the WINDOWS NT operating system, the sequencers (which are asserted to disclose the claimed protocol engines) execute in operating system space. However, there is no such teaching in Averbuj. Averbuj is silent as to whether the sequencers execute in operating system space or user space. As such, because Smith and Averbuj fail to disclose the recited elements in "user space" and "operating system space" as claimed, claim 26 is patentable over the cited references.

As to claim 31, claim 31 recites "a plurality of script interpreter units in user space", "an application thread in operating system space" and "a plurality of protocol engines in operating system space". The Office Action states that Smith's user test computer 202 discloses "user space". This is not so. A user computer includes both "user space" and "operating system space". Importantly, Smith does not disclose the claimed "user space" as to the script interpreter units. Smith is silent as to whether the script interpreter units execute in user space. Moreover, the Office Action fails to show where and whether Smith discloses that the threads of control (which are asserted to teach the claimed application threads) are in operating system space. Review of Smith shows that Smith is silent as to whether the threads of control execute in user space or operating

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system space. In addition, the Office Action appears to assert that because Averbuj discloses the WINDOWS NT operating system, the sequencers (which are asserted to disclose the claimed protocol engines) execute in operating system space. However, there is no such teaching in Averbuj. Averbuj is silent as to whether the sequencers execute in operating system space. Therefore, because Smith and Averbuj fail to disclose the recited elements in "user space" and "operating system space" as claimed, claim 31 is patentable over the cited references.

To the extent independent claims 21, 26 and 31 each recite "user space" and "operating system space", as set forth in the prior paragraphs, the combination of Smith and Averbuj fails to teach or suggest all of the claimed limitations. Therefore, claims 21, 26 and 31 are patentable over the cited references. By virtue of their dependence on claims 21, 26 and 31, all claims dependent on claims 21, 26 and 31 are patentable over the cited references.

For the reasons set forth above, all claims are patentable over the combination of references. As such, this rejection should be withdrawn.

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Conclusion

It is submitted, however, that the independent and dependent claims include other significant and substantial recitations which are not disclosed in the cited references. Thus, the claims are also patentable for additional reasons. However, for economy the additional grounds for patentability are not set forth here.

In view of all of the above, it is respectfully submitted that the present application is now in condition for allowance. Reconsideration and reexamination are respectfully requested and allowance at an early date is solicited.

The Examiner is invited to call the undersigned to answer any questions or to discuss steps necessary for placing the application in condition for allowance.

Respectfully submitted,

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